

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

BRIAN BOYKINS,

Petitioner,

v.

KENNETH McKEE,

Respondent,

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Civil No. 2:13-CV-12768

HONORABLE LAWRENCE P. ZATKOFF  
UNITED STATES DISTRICT JUDGE

**OPINION AND ORDER HOLDING IN ABEYANCE THE PETITION FOR WRIT OF  
HABEAS CORPUS AND ADMINISTRATIVELY CLOSING THE CASE.**

Brian Boykins, (“Petitioner”), presently confined at the Bellamy Creek Correctional Facility in Ionia, Michigan, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges his conviction for armed robbery, M.C.L.A. 750.529, kidnapping, M.C.L.A. 750.349, carrying a concealed weapon, M.C.L.A. 750.227, felon in possession of a firearm, M.C.L.A. 750.224f, possession of a firearm in the commission of a felony, M.C.L.A. 750.227b, and being a fourth felony habitual offender, M.C.L.A. 769.12. Petitioner has now filed a motion to hold the petition in abeyance to permit him to file a post-conviction motion in the state courts to raise an additional claim that has not been exhausted with the state courts. For the reasons stated below, the Court will hold the petition in abeyance and will stay the proceedings under the terms outlined below in the opinion to permit petitioner to return to the state courts to exhaust his additional claim. The Court will also administratively close the case.

**I. Background**

Petitioner was convicted of the above offenses following a jury trial in the Wayne County

Circuit Court. Petitioner's conviction was affirmed on appeal. *People v. Boykins*, No. 285476 (Mich.Ct.App. October 27, 2009); *lv. den.* 486 Mich. 905, 780 N.W.2d 833 (2010).

Petitioner then filed a post-conviction motion for relief from judgment with the Wayne County Circuit Court, which was denied. *People v. Boykins*, No. 07-021072-FC (Wayne County Circuit Court, November 10, 2011). The Michigan appellate courts denied petitioner leave to appeal. *People v. Boykins*, No. 310158 (Mich.Ct. App. October 24, 2012); *lv. den.* 494 Mich. 855, 830 N.W.2d 403 (2013).

On June 19, 2013, petitioner filed a petition for writ of habeas corpus, in which he seeks habeas relief on the grounds that he raised in the Michigan courts.

Petitioner has now filed a motion to hold the habeas petition in abeyance so that he can return to the Wayne County Circuit Court to present a new claim in a post-conviction motion for relief from judgment.

## II. Discussion

A federal district court has the authority to abate or dismiss a federal habeas action pending resolution of state post-conviction proceedings. *See Brewer v. Johnson*, 139 F. 3d 491, 493 (5<sup>th</sup> Cir. 1998). However, in order to stay federal proceedings and hold a habeas petition in abeyance pending resolution of state court proceedings, there must be exceptional or unusual circumstances. *See Sitto v. Bock*, 207 F. Supp. 2d 668, 676 (E.D. Mich. 2002); *Hudson v. Martin*, 68 F. Supp. 2d 798, 800 (E.D. Mich. 1999). A federal district court is authorized to stay fully exhausted federal habeas petitions pending the exhaustion of other claims in the state courts. *See Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 77-79 (1<sup>st</sup> Cir. 2002)(holding that district courts should “take seriously any request for a stay.”); *Anthony v. Cambra*, 236 F. 3d 568, 575 (9<sup>th</sup> Cir. 2000); *See*

also *Bowling v. Haeberline*, 246 Fed. Appx. 303, 306 (6<sup>th</sup> Cir. 2007)(A habeas court is entitled to delay a decision in a habeas petition that contains only exhausted claims “when considerations of comity and judicial economy would be served”)(quoting *Nowaczyk*, 299 F. 3d at 83).

The Court will grant petitioner’s motion to hold the petition in abeyance while he returns to the state courts to exhaust an additional claim. In this case, the outright dismissal of the petition, albeit without prejudice, might result in preclusion of consideration of petitioner’s claims in this Court due to the expiration of the one year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2244(d)(1). A common circumstance calling for abating a habeas petition arises when the original petition was timely filed, but a second, exhausted habeas petition would be time barred by the AEDPA’s statute of limitations. *See Hargrove v. Brigano*, 300 F. 3d 717, 720-21 (6<sup>th</sup> Cir. 2002). The U.S. Supreme Court, in fact, has suggested that a habeas petitioner who is concerned about the possible effects of his state post-conviction filings on the AEDPA’s statute of limitations could file a “protective” petition in federal court, as petitioner has apparently done here, and then ask for the petition to be held in abeyance pending the exhaustion of state post-conviction remedies. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005)(citing *Rhines v. Weber*, 544 U.S. 269 (2005)). A federal court may stay a federal habeas petition and hold further proceedings in abeyance pending resolution of state court post-conviction proceedings, provided there is good cause for failure to exhaust claims and that the unexhausted claims are not “plainly meritless.” *Rhines*, 544 U.S. at 278.

The Court is aware that the petitioner has already filed one motion for relief from judgment. Pursuant to M.C.R. 6.502(G)(1), a criminal defendant in Michigan can typically file only one motion for relief from judgment with regard to a criminal conviction. *See Banks v. Jackson*, 149 Fed. Appx.

414, 418 (6<sup>th</sup> Cir. 2005); *Hudson v. Martin*, 68 F. Supp. 2d at 800 (citing to *People v. Ambrose*, 459 Mich. 884; 587 N. W. 2d 282 (1998)). However, M.C.R. 6.502(G)(2) states that a defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. *Banks*, 149 Fed. Appx. at 418; *Hudson*, 68 F. Supp. 2d at 800-01. Petitioner alleges in his motion that he has newly discovered evidence in support of the claim that he wishes to raise in a second motion for relief from judgment. Because there is some likelihood that the Michigan courts might permit petitioner to file a second post-conviction motion for relief from judgment pursuant to the newly discovered evidence exception contained in M.C.R. 6.502(G)(2), a procedural bar to petitioner filing such a second motion is not clearly applicable. Therefore, this Court should grant petitioner a stay of proceedings to permit him to attempt to exhaust the claim contained in his second motion for relief from judgment with the state courts. *See Banks*, 149 Fed. Appx. at 419-20.

However, even where a district court determines that a stay is appropriate pending exhaustion of state court remedies, the district court “should place reasonable time limits on a petitioner’s trip to state court and back.” *Rhines*, 544 U.S. at 278. Therefore, to ensure that there are no delays by petitioner in exhausting his state court remedies, this Court will impose upon petitioner time limits within which he must proceed with his state court post-conviction proceedings. *See Palmer v. Carlton*, 276 F. 3d 777, 781 (6<sup>th</sup> Cir. 2002). Petitioner must present his claims in state court within sixty days from the date of this Order. *See id.* Further, he must ask this Court to lift the stay within sixty days of exhausting his state court remedies. *See id.* “If the conditions of the stay are not met, the stay may later be vacated nunc pro tunc as of the date the stay was entered, and the petition may be dismissed.” *Id.*, at 781 (internal quotation omitted).

Petitioner's method of properly exhausting his claim in the state courts would be through filing a motion for relief from judgment with the Wayne County Circuit Court under M.C.R. 6.502. A trial court is authorized to appoint counsel for petitioner, seek a response from the prosecutor, expand the record, permit oral argument, and hold an evidentiary hearing. M.C.R. 6.505-6.507, 6.508 (B) and (C). Denial of a motion for relief from judgment is reviewable by the Michigan Court of Appeals and the Michigan Supreme Court upon the filing of an application for leave to appeal. M.C.R. 6.509; M.C.R. 7.203; M.C.R. 7.302. *Nasr v. Stegall*, 978 F. Supp. 714, 717 (E.D. Mich. 1997).

### III. ORDER

**IT IS HEREBY ORDERED** that the proceedings are **STAYED** and the Court will hold the habeas petition in abeyance. Petitioner must file a motion for relief from judgment in state court within sixty days of receipt of this order. He shall notify this Court in writing that such motion papers have been filed in state court. If he fails to file a motion or notify the Court that he has done so, the Court will lift the stay and will reinstate the original petition for writ of habeas corpus to the Court's active docket and will proceed to adjudicate only those claims that were raised in the original petition. After petitioner fully exhausts his new claim or claims, he shall file an amended petition that includes the new claim or claims within sixty days after the conclusion of his state court post-conviction proceedings, along with a motion to lift the stay. Failure to do so will result in the Court lifting the stay and adjudicating the merits of the claims raised in petitioner's original habeas petition.

To avoid administrative difficulties, the Court **ORDERS** the Clerk of Court to **CLOSE** this case for statistical purposes only. Nothing in this order or in the related docket entry shall be

considered a dismissal or disposition of this matter. *See Sitto*, 207 F. Supp. 2d at 677.

s/Lawrence P. Zatkoff  
**HON. LAWRENCE P. ZATKOFF**  
**UNITED STATES DISTRICT COURT**

**DATED:** September 6, 2013